Supreme Court, U.S.
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No. 04-___

IN THE

Supreme Court of the United States

NIBCO, Inc.,
Petitioner,

v.

Martha Rivera, *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Howard Sagaser
William Hahesy
Sara Hedgpeth-Harris
Brian Enos
SAGASER, FRANSON & JONES
2445 Capitol Street
Second Floor
Fresno, CA 93721

Thomas C. Goldstein
(*Counsel of Record*)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

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QUESTIONS PRESENTED

1. Whether a court may enter a protective order precluding pre-trial discovery of a party's illegal activity despite the fact that the illegal activity is highly relevant to that party's claim.

2. Whether this Court's holding in *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137 (2002), that the Immigration Reform and Control Act precludes backpay awards to illegal aliens is limited merely to claims under the National Labor Relations Act.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are respondents here: Mao Her, Alicia Alvarez, Eva Ariola, Peuang Bounnhong, Chhom Chan, Bee Lee, Paula Martinez, Maria Domitilia Medina, Mai Meemouā, Margarita Mendoza, Bao Nhia Moua, Isidra Murillo, Maria Navarro, Vath Rattanatay, Ofelia Rivera, Sara Rivera, Maria Rodriguez, Maria Ruiz, Maria Valdivia, Sy Vang, Youa Xiong, and See Yang.

RULE 29.6 DISCLOSURE

Petitioner NIBCO, Inc. has no parent corporation and no publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner NIBCO, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The relevant opinions and orders of the magistrate judge (Pet. App. 60a-69a, 204 F.R.D. 647), the district court (*id.* 55a-59a; 70a-72a), the court of appeals (*id.* 1a-29a, 364 F.3d 1057; 73a), and the judges dissenting from the denial of rehearing en banc (*id.* 30a-54a, 384 F.3d 822) are reproduced in the Appendix.

JURISDICTION

The court of appeals denied a timely petition for rehearing and rehearing en banc on September 20, 2004. See Pet. App. 31a. On December 16, 2004, Justice O'Connor extended the time to file this Petition to and including December 27, 2004. App. 04-521. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix (74a-75a).

STATEMENT OF THE CASE

In *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137, 140 (2002) (*Hoffman Plastic*), this Court held that an award of backpay to an undocumented alien who cannot lawfully work in this country is "foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA)." In a ruling obviously intended to circumvent this Court's holding, the Ninth Circuit (per Reinhardt, J.), declined to apply *Hoffman Plastic* to disparate impact claims under Title VII of the Civil Rights Act of 1964 (Title VII), instead upholding a protective order that

immunizes plaintiffs from pre-trial discovery regarding their immigration status.

Review is warranted for the reasons set forth in Judge Bea's extensive dissent from the denial of rehearing en banc, which was joined by three other judges. Pet. App. 31a-54a. The discovery precluded by the Ninth Circuit's ruling is essential to the trial rights of defendants in this recurring class of cases, for it determines whether the plaintiffs are entitled to the remedies they seek under Title VII and whether their state claims are barred. The panel's view that the discovery must be precluded as a matter of law because it would "chill" Title VII claims (*id.* 8a) is contrary to other courts' decisions establishing bedrock principles of federal discovery. Those courts recognize that plaintiffs have no right to avoid discovery of their own illegal conduct and that, to the extent a legitimate privacy interest exists, a more narrowly tailored protective order will avoid disclosure of the information to the authorities. The panel's contrary ruling "impedes the ascertainment of the truth in advance of trial, thereby profoundly subverting the purposes of liberal Discovery in civil cases," and "frustrates the purposes of national Immigration policy: to limit employment benefits to American citizens and foreign persons authorized to work in this country." *Id.* 31a.

Certiorari should accordingly be granted.

1. This is an action under Title VII, 42 U.S.C. 2000e *et seq.*, and the California Fair Employment and Housing Act (FEHA), California Government Code 12900 *et seq.* Respondents, twenty-three Latina and Southeast Asian women who are former employees of petitioner NIBCO, Inc., complain that a test administered by NIBCO had an unlawful disparate impact because it led to the disproportionate layoffs of Asian and Hispanic employees. Respondents do not allege that petitioner engaged in purposeful discrimination.

Respondents' complaint seeks backpay, reinstatement, frontpay for those not electing reinstatement, compensatory and punitive damages, injunctive and declaratory relief, and

attorneys' fees and costs. Because NIBCO no longer owns the facility, it is undisputed that reinstatement is not a possibility. NIBCO has denied the allegations of the complaint.

As it comes to this Court, the case concerns petitioner's rights to discovery on an issue that, per *Hoffman Plastic*, is critical to respondents' eligibility for these remedies: respondents' immigration status. Respondents sought a protective order precluding any pre-trial discovery into their immigration status and into whether they were lawfully working in the United States. They made their request under Fed. R. Civ. P. 26(c), which permits the entry of a protective order upon a showing of "good cause" that "justice requires [precluding discovery] to protect a party or person from annoyance, embarrassment, [or] oppression."

Petitioner opposed the motion on the ground that the discovery was highly relevant and that a protective order completely barring discovery – as opposed to prohibiting disclosure to non-parties – was unwarranted. Petitioner explained that, if respondents were not legally authorized to work in the United States, federal law would preclude them from receiving backpay. Relatedly, under the after-acquired evidence doctrine, respondents' right to reinstatement and frontpay would expire as of the date petitioner learned of their immigration status. In addition, settled California precedent precludes FEHA wrongful-termination claims by plaintiffs who were not legally authorized to work. *Murillo* v. *Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 845 (1998); *Camp* v. *Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 638-39 (1995).

The magistrate judge issued the requested protective order prohibiting discovery. Pet. App. 60a-69a. The magistrate notably did not take the narrower course of "limit[ing] disclosure of that information to the parties and their attorneys," as it had done with respect to other discovery. *Id.* 4a. The district court affirmed, *id.* 55a-59a, but certified its order for in-

terlocutory review (*id.* 70a-72a), and the court of appeals accepted the certification (*id.* 73a).

2. The Ninth Circuit affirmed. While expressing serious doubts that respondents' immigration status was relevant to their claims because the panel would limit *Hoffman Plastic* to its facts (Pet. App. 13a, 18a), the court decided the case on the assumption that the discovery was relevant (*id.* 18a). The court rested its decision on its conclusion as a matter of law – as opposed to the specific facts of this case – that discovery into immigration status would "chill" the prosecution of civil rights claims. Would-be plaintiffs, the court reasoned, would fear that the information would be used by immigration authorities to institute criminal prosecutions or deportation proceedings. *Id.* 8a. Such a prospect could "deter them, and future plaintiffs, from bringing meritorious claims." *Id.* 9a. Judge Reinhardt, in reasoning avowedly applicable to "every case involving national origin discrimination," maintained that the consequence would be that "countless acts of illegal and reprehensible conduct would go unreported." *Id.* 10a.

The panel found no offsetting interest in the discovery that would outweigh its supposed adverse effects on the vindication of civil rights claims. It reasoned that "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases." Pet. App. 17a-18a. Moreover, federal immigration policy would in any event preclude only the award of backpay, as opposed to the imposition of liability. *Id.* 18a-19a.

The panel conceded that the discovery "would aid [a civil rights] defendant in making pre-trial estimates of the damage award for which it might be responsible if found liable." Pet. App. 19a. But it deemed that fact "substantially outweighed by the harm the discovery would cause the plaintiffs." *Ibid.* "[L]iability must be determined in any event," the panel reasoned, because the plaintiffs could be entitled to an award of attorneys' fees. *Ibid.*

The panel also rejected petitioner's reliance on the after-acquired evidence doctrine, which – as this Court held in *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) – cuts off a plaintiff's right to reinstatement or damages as of the date she would otherwise have been lawfully terminated by the employer. In this case, petitioner maintained that it would have been required by federal immigration law to terminate any of the respondents who were not authorized to work lawfully upon learning of that fact. But the court of appeals held that the "*McKennon* Court did not hold that depositions could be conducted for the purpose of uncovering illegal actions." Pet. App. 22a.

The panel also acknowledged California state court precedents precluding wrongful discharge claims by persons not authorized to work in this country. Pet. App. 24a. It reasoned that those decisions "may no longer be good law" in light of an intervening state statute. Although it acknowledged that the statute itself may be preempted by federal immigration laws, the panel concluded that all such questions could be avoided now because – as with respondents' Title VII disparate impact claims – the discovery sought supposedly went only to the question of damages, not liability. *Ibid.*

3. Petitioner's petition for rehearing and rehearing en banc was denied over an extensive dissent by four judges. Pet. App. 31a (Bea, J., joined by Kozinski, Kleinfeld, and Gould, JJ.). The dissenters explained that the panel's ruling both "profoundly subvert[s]" the federal discovery rules and "frustrates" federal immigration law. *Ibid.* The "hardship" supposedly justifying the protective order, the dissenters explained, was merely the prospect of "end[ing] plaintiffs' enjoying benefits to which they are not entitled under the law." *Id.* 35a. "The fact is that if plaintiffs do not have authorized immigration status, they are not entitled to be awarded back wages or wages they might have earned in the future from a job which they were incapable of holding, under our Immigration laws." *Id.* 32a. Moreover, the plaintiffs had produced "no *evidence* to substantiate its conclusion that anyone in this

lawsuit would be so 'chilled'" from litigating civil rights claims, but instead relied on an "*ipxe dixit* hunch." *Id.* 41a (emphasis in original).

The dissenters also highlighted the flaw in the panel's reliance on the fact that respondents' immigration status purportedly determines only the availability of certain remedies, rather than petitioner's liability. "[P]re-trial discovery has been recognized as an essential means for evaluation of damages, so that settlements can be achieved." Pet. App. 33a. In particular, under Fed. R. Civ. P. 68, defendants have the right "to make an offer of settlement by way of permission to take judgment in an amount, cutting off the plaintiffs' right to recover costs and attorneys' fees if the eventual award does not exceed the offer of judgment." *Id.* 34a n.2. But under the panel's holding, defendants "will have to prepare for trial or enter into settlement negotiations without essential proof to defend against the claims for wage loss, past and future, as well as foundational evidence (place of birth) for actuarial projections for the possible extent of non-economic damages (duration of emotional distress)." *Id.* 35a.

The dissenters also dismissed as unwarranted the panel's doubts that this Court's decision in *Hoffman Plastic* extends to Title VII claims. Of note, "the remedial language of [the NLRA and Title VII] is virtually identical." Pet. App. 51a. And "in holding that unauthorized aliens are not entitled to backpay under the NLRA, the Supreme Court [in *Hoffman Plastic*] reasoned that 'allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.' The same rationale applies here: allowing federal courts to award backpay to illegal aliens would also 'unduly trench upon' federal immigration policy as codified in the IRCA." *Id.* 53a.

The dissenters finally recognized that, however laudable the panel believed its goals, the courts "risk corrupting an admirable civil rights policy to prevent discrimination when

we rely on evasions to enforce it." Pet. App. 32a. "[T]here is simply is no principled reason for delaying frank investigation of the nature and extent of damages, unless it is a desire to advantage the plaintiffs, at least temporarily, and for the purposes of driving a higher settlement." *Id.* 33a. "[T]he panel accepts a gauzy and warm rationale for an evasion meant to impede the search for the truth. Such misguided compassion will surely corrupt the administration of our civil rights statutes, and threaten to bring them into public disrepute." *Id.* 54a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has held as a matter of law that plaintiffs are immune from pre-trial discovery of their immigration status notwithstanding that the requested discovery is directly relevant to the plaintiffs' claims. That holding merits review in this Court for two reasons. *First*, it is contrary to rulings of other federal courts that a party is not entitled to withhold relevant discovery when a more tailored protective order would resolve any legitimate concerns that the discovery would become public and when the discovery relates to the party's own *illegal* conduct. *Second*, to the extent that the court of appeals' decision rested on its strong suggestion that *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137 (2002), does not extend to Title VII disparate impact claims, that conclusion independently merits review in this Court, for if accepted it would thwart this Court's determination that the award of backpay to persons not authorized to work in this country substantially undermines federal immigration policy.

I. Certiorari Should Be Granted To Review The Ninth Circuit's Holding That Plaintiffs Are Entitled To Preclude Pre-Trial Discovery Into Their Immigration Status When That Status Is Relevant To Their Claims.

This Court should review the Ninth Circuit's holding that plaintiffs are entitled to a protective order immunizing them

from pre-trial discovery into their unlawful conduct when that discovery is highly relevant to their claims. That ruling runs contrary to basic principles of federal discovery long recognized by other courts of appeals. It furthermore seriously undercuts this Court's holding in *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), that employers are not liable for backpay damages as of the date they discover facts – such as unlawful immigration status or other illegal activity – that would have led them to lawfully terminate the employee. The Ninth Circuit's decision deprives *McKennon* of most of its force in this context, given that (as other circuits have recognized) such after-acquired evidence is almost always secured *in discovery*.

1. The court of appeals did not find that the immigration status of a civil rights plaintiff is immune from discovery as "privileged." Rather, it identified an amorphous "privacy" interest in keeping that status a secret from the plaintiff's employer. Inescapably, the "embarrassment" respondents seek to avoid is nothing more than the exposure of illegal activity – for potential exposure of an employee's *lawful* immigration status would pose no risk of "chilling" respondents' assertion of their Title VII rights. Respondents claim a "privacy" right to hold, free from public scrutiny, jobs that they are legally prohibited from holding, and to live unlawfully in this country. In other contexts, this Court has repeatedly refused to recognize privacy interests in unlawful conduct (see, *e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 123 (1984); *United States* v. *Place*, 462 U.S. 696, 707 (1983)), and it has recognized that the degree of privacy interference caused by requests for proof of valid immigration status – even when conducted by police at traffic checkpoints – is minimal (see *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

By nonetheless accepting respondents' asserted privacy interest, the Ninth Circuit's decision flouts the policy of liberal discovery of the Federal Rules of Civil Procedure. The general rule is that "[p]arties may obtain discovery regarding

any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). As this Court explained in *Hickman* v. *Taylor*,

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. * * * Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the *fullest possible knowledge of the issues and facts* before trial.

329 U.S. 495, 500-01 (1947) (emphasis added); see also *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957) (observing that the federal notice pleading system "is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues"). Protective orders under Rule 26(c) must therefore be narrowly drawn and can only be issued for "good cause." "It is especially difficult to show grounds for ordering that discovery not be had when, as here, it is a deposition that is sought. Not only are protective orders prohibiting depositions rarely granted, but the plaintiff has a heavy burden of demonstrating the good cause for such an order." *SEC* v. *Dowdell*, 53 Fed. R. Serv. 3d (Callaghan) 1443 (E.D. Va. 2002) (citing 8 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2037 (2d ed. 1994)).

For this reason, even when there are valid reasons for fearing that information obtained during discovery will be misused, discovery on a given issue should not be *denied* when a more tailored protective order can be drawn to protect legitimate privacy concerns while permitting the parties to obtain the information necessary to litigate or settle the case. See, *e.g.*, *CSC Holdings* v. *Redisi*, 309 F.3d 988, 995-96 (CA7 2002) (reversing for abuse of discretion a district court's order barring discovery of evidence the district court feared might be used unlawfully, holding: "This concern may have been realistic, but there are mechanisms short of an outright denial of discovery to deal with it * * *. Each of these solutions would have made it possible for the Redisis to mount a defense; the outright denial of access * * * did not.").

Any legitimate interest that respondents may have had in avoiding the disclosure of their immigration status and thereby preventing embarrassment or exposure to prosecution or deportation could have been easily solved by a protective order barring petitioner from disseminating that information. See Fed. R. Civ. P. 26(c) (authorizing courts to fashion orders, including, *e.g.*, requirements that certain information obtained through discovery be placed under seal, to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); see also *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34-35 (1984) (upholding such a protective order against a First Amendment challenge, explaining that when liberal discovery "seriously implicate[s] privacy interests of litigants," protective orders against dissemination can prevent abuses while allowing discovery for the purpose of assisting in the preparation and trial, or the settlement, of litigated disputes). Indeed, this Court in *Seattle Times* explained that the fruits of discovery are traditionally, and still typically, not public; they are turned over to parties strictly for the purpose of litigation. 467 U.S. at 33 (holding that "pretrial depositions and interrogatories are not public components of a civil trial"); see also, *e.g.*, *Courier-Journal* v. *Marshall*, 828 F.2d 361, 367 (CA6 1987) (following *Seattle*

Times in upholding a protective order as an appropriate means of balancing the right of litigants to discovery, the privacy interests of those subject to discovery requests, and "the very limited right of access the press has to the presumptively non-public fruits of civil discovery"); *In re Grand Jury Subpoena (Under Seal)*, 836 F.2d 1468, 477 (CA4) (holding that "a district court has alternatives available to encourage parties to comply with the goal of liberal discovery short of entry of a protective order" barring discovery), cert. denied, 487 U.S. 1240 (1988); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 7-15, 37-39 (1983) (explaining that the privacy of discovery materials is ensured by routine litigation practice and, if necessary, by limited protective orders) (cited in *Seattle Times*, 467 U.S. at 33).

Because the district court did not bifurcate the trial proceedings into liability and damages phases, the panel's observation that petitioners' liability under Title VII does not turn on respondents' immigration status is – as Judge Bea's dissent from the denial of rehearing en banc notes – simply irrelevant. The proper remedy, including whether backpay can be awarded, *does* depend on respondents' immigration status, and unless proceedings are bifurcated, parties have a right to pretrial discovery on any issue relevant either to liability or to the remedy. See Pet. App. 33a (citing cases). Nor does the mere fact that some evidence is relevant only to remedy and not to liability mean that the district court should have exercised its discretion to bifurcate while denying pre-trial discovery. See, *e.g.*, *In re Selcraig*, 705 F.2d 789, 798 (CA5 1983) ("We do not think it appropriate to require that the trial procedure be altered, simply to protect [a witness's] privilege. Bifurcating the trial would either require the damage case to be presented without adequate pretrial discovery, or else would require a delay between the two trial stages.").

Nothing about the context of Title VII and immigration takes this case outside the settled rules governing discovery in the federal courts. To the contrary, this Court's decision in

Hoffman Plastic strongly supports petitioner's position. Whereas the Ninth Circuit deemed the discovery of respondents' immigration status to be contrary to federal law, *Hoffman Plastic* compels precisely the opposite conclusion: "[C]ombating the employment of illegal aliens" is "central to the policy of immigration law." 535 U.S. at 147. See *infra* Part II.

Allowing the courts to extend a discovery privilege in the context of Title VII litigation to facilitate concealment of the fact that a plaintiff is an illegal alien would thus "unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Hoffman Plastic*, 535 U.S. at 151. Shielding illegal aliens from discovery of their illegal status when they seek remedies to which they are not entitled or assert claims that may be barred because of that status "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." *Id.* at 151-52. However broad a court's authority may be to fashion protective orders, it is not so broad as to establish a discovery privilege designed to shield illegal aliens from discovery of their illegal status when it is so clearly relevant to the issues that their own lawsuit places in controversy.

2. Certiorari is equally warranted because the Ninth Circuit's decision in this case leaves this Court's decision in *McKennon* essentially an empty shell. According to the court of appeals, respondents were entitled to an order precluding the discovery of evidence highly relevant to the after-acquired evidence doctrine because the "*McKennon* Court did not hold that depositions could be conducted for the purpose of uncovering illegal actions." Pet. App. 22a. That ruling contravenes the most basic principles of federal discovery: the doctrine renders respondents' immigration status highly relevant to petitioner's liability, and hence discoverable. In fact, the evidence at issue in *McKennon* was itself acquired during the course of the plaintiff's deposition. 513 U.S. 352, 355 (1995) (emphasis added).

Other courts reject the Ninth Circuit's invitation to circumvent the after-acquired evidence doctrine recognized by this Court in *McKennon*. As the Seventh Circuit has recognized, the employer secures such evidence "typically in discovery." *Sheehan* v. *Donlen Corp.*, 173 F.3d 1039, 1047 (1999). See also, *e.g.*, *Mardell* v. *Harleysville Life Ins. Co.*, 31 F.3d 1221, 1222 (CA3 1994) (evidence is uncovered "typically" in "subsequent legal proceedings"), after remand, 65 F.3d 1072 (CA3 1995). And the courts have not hesitated to permit discovery to identify evidence relevant to the after-acquired evidence defense. *E.g.*, *Mardell*, 65 F.3d at 1073 n.2 (under *McKennon*, district court "would be well advised to permit further discovery" going to after-acquired evidence). District courts regularly address legitimate privacy concerns arising from the discovery of after-acquired evidence not by precluding discovery altogether, but instead through the use of protective orders "restricting defendants' use and disclosure of the" information. *E.g.*, *Davenport* v. *Indiana Masonic Home Found.*, No. IP 00-1047-C H/G, 2003 U.S. Dist. LEXIS 6350, at *9 (S.D. Ind. Mar. 27, 2003).

3. It is no answer that the district court – having thus far declined to bifurcate the liability and remedies phases of the proceedings and permit post-trial discovery into respondents' immigration status – could reverse itself. That option has already been put before the district court, which has not adopted it. Equally important, that prospect shows the illogic of the Ninth Circuit's decision: if a district court were to bifurcate proceedings and permit the requested discovery post-trial, the information would be provided to the employer. Any collateral consequence of dissuading illegal aliens from bringing suit under such a regime would be *no different* than if the discovery were provided at the outset, as the Rules of Civil Procedure contemplate. Put another way, there is no logical justification for ruling that the discovery of plaintiffs' immigration status should be *permitted* eventually but *deferred* until post-trial. The only consequence of such a ruling

is to disadvantage employer-defendants in the meantime and, as a result, encourage violations of the immigration laws.

The adverse effects upon employers and the litigation process generally are plain. Defendants are unable effectively to depose or cross-examine plaintiffs' expert economist regarding the accuracy of damage calculations and the underlying assumptions regarding mitigation efforts. Defendants' expert are unable to arrive at accurate valuations of plaintiffs' damages because of missing information regarding mitigation. As the en banc dissenters noted, under Fed. R. Civ. P. 68, defendants are unable to exercise their right to make an offer of settlement that eliminates their exposure to attorneys' fees. The ruling in this case makes such an offer impossible as a practical matter.

Beyond the issue of damages, most objectionable is that plaintiffs are able to place before the jury claims for which they have no legal support and for damages to which they are not entitled. The "spillover" prejudicial affect of unfounded Title VII backpay claims being presented to the jury is that plaintiffs could utilize such claims to support their allegations of emotional distress and/or as a basis for calculating punitive damages under state law. Moreover, in this case, the post-trial process disregards NIBCO's right to litigate its legal theory that plaintiffs' state-law claims are completely barred.

Finally, respondents' immigration status is relevant to whether they can state a claim – not merely secure damages – on their state-law theories as well. California case law precludes FEHA wrongful-termination claims by plaintiffs who were not legally authorized to work. *Murillo* v. *Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 845 (1998); *Camp* v. *Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 638-39 (1995). (The Ninth Circuit suggested that these decisions

may have been superseded by statute, but did not so hold (Pet. App. 24a), and no California case takes that view.) [1]

II. Certiorari Should Be Granted To Decide Whether This Court's Decision In *Hoffman Plastic* Extends To Disparate Impact Claims Under Title VII.

This Court held in *Hoffman Plastic* – a case under the NLRA – that the federal Immigration Reform and Control Act of 1986 precludes a backpay award to a person not authorized to work in this country. Although the Ninth Circuit in this case did not definitively decide whether *Hoffman Plastic* extends to claims under Title VII, it strongly so implied in a lengthy dictum obviously intended to persuade other courts to limit *Hoffman Plastic* to its facts. See Pet. App. 12a-18a. By granting certiorari, this Court would ensure conformity with its precedent and would have the opportunity to resolve the continuing uncertainty regarding the reach of *Hoffman Plastic*.

1. The employer in *Hoffman Plastic* unlawfully laid off four employees in response to their support of a union-organizing campaign. In administrative proceedings, the employer was able to discover that one employee was not authorized to work in this country; he had used a friend's birth certificate to obtain a California driver's license and a Social Security card and then used those documents to obtain employment with Hoffman. 535 U.S. at 141. The NLRB held that the employee was nonetheless entitled to backpay, reasoning that "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."

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[1] The fact that a defendant may ultimately prevail on the merits of the case is thus no answer to the serious prejudice it will suffer during the trial and to the effect of the court of appeals' holding on undermining Congress's goal of encouraging settlements.

Ibid. (quoting 326 N.L.R.B. 1060). The D.C. Circuit affirmed. 208 F.3d 229 (2000).

This Court reversed, explaining that precedent imposed an "express limitation of backpay to aliens 'lawfully entitled to be present and employed in the United States.'" 535 U.S. at 146 (quoting *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 903 (1984)). Even more significant, "IRCA 'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Id.* at 147. The statute established a reticulated regime that is designed to limit employment to those persons lawfully entitled to work in this country and that requires an employer "to discharge the worker upon discovery of the worker's undocumented status." *Id.* at 148. "Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." *Ibid.* "Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations." *Id.* at 150.

Hoffman Plastic establishes that, if any of respondents are undocumented aliens, they are not entitled to the backpay relief sought by their complaint. It follows, *a fortiori*, that respondents' immigration status is relevant to their claim and discoverable. And the rationale of *Hoffman Plastic* supports the conclusion that the failure to provide discovery of plaintiffs' immigration status runs directly contrary to federal immigration policy as codified in IRCA. See *supra* Part I.

2. There is no merit to the Ninth Circuit's lengthy suggestion (Pet. App. 13a-18a) that *Hoffman Plastic* does not apply in civil rights cases. Precisely the same legal regime that required the employer in *Hoffman Plastic* to inquire into the immigration status of its employees and to discharge an undocumented worker applies here. There is accordingly no serious suggestion that an award of backpay under Title VII would any less undermine federal immigration policy and

"encourage[] future violations" (*Hoffman Plastic*, 535 U.S. at 150) than an equivalent award under the NLRA.

The distinctions perceived by the court of appeals between the statutory schemes are immaterial. Title VII's "backpay provision was *expressly modeled* on the backpay provision of the National Labor Relations Act." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 (1975) (emphasis added). This Court in *Hoffman Plastic* moreover relied on the fact that an NLRA claimant has an obligation to mitigate his damages but undocumented aliens are precluded from doing so as a matter of law "without triggering new IRCA violations." 535 U.S. at 150. Title VII plaintiffs have the same duty to mitigate. *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 231 (1982).

To be sure, as the panel noted, private parties often enforce Title VII, while the NLRB enforces the NLRA. Pet. App. 13a-14a. But as the en banc dissenters explained, "the question here is not *who* can vindicate the rights, but *what damages* can be recovered. As to backpay and frontpay, both the NLRA and Title VII provide them as remedies. The two enactments are not broader or narrower as to this remedy." *Id.* 50a-51a (emphases in original).

The panel also noted that Title VII authorizes greater remedies than does the NLRA. Pet. App. 14a-15a. But the en banc dissenters correctly responded that "[t]he question is not *whether* unauthorized aliens are entitled to compensatory and punitive damages – they are – but *what is the scope of* the compensatory damages available under the two statutes. Courts have recognized that the remedial language of the two statutes is virtually identical." *Id.* 51a (emphases in original).

Finally, the court of appeals erred in contending that the public interest furthered by Title VII outweighs Congress's goals in the immigration laws. Although the public policy concerns advanced by Title VII are indisputably significant, the same is clearly true of those advanced by the NLRA. Yet this Court rejected an indistinguishable argument in *Hoffman*

Plastic. And "[t]here is nothing in either the *Hoffman* opinion or caselaw to suggest that the policy concerns underlying Title VII trump the policy considerations of the IRCA." Pet. App. 53a.

Respondents moreover assert a *disparate impact* claim – that is, they do not contend that petitioner engaged in purposeful national origin discrimination. By contrast, in *Hoffman Plastic*, there was no dispute that the employer purposefully violated federal labor law. It therefore makes no sense to say that Congress regards the conduct of employers such as petitioner to be more objectionable than that of employers who violate the NLRA.

3. This Court's guidance is furthermore sorely needed because, although the court of appeals cited decisions allegedly agreeing with its view that *Hoffman Plastic* is limited to cases under the NLRA (Pet. App. 17a-18a n.12), other courts would reach the opposite result in this case. Petitioner clearly would have prevailed in the Fourth Circuit. In *Egbuna* v. *Time-Life Libraries, Inc.*, 153 F.3d 184 (1998), a broad majority of the en banc Fourth Circuit held that undocumented workers receive no protections under Title VII because, under IRCA, they cannot be deemed "qualified" employees for purposes of the statute.

In the proceedings below, petitioner has assumed *arguendo* that undocumented aliens are qualified (because the Ninth Circuit had so assumed, see *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1517 n.10 (1989)), but that does not change the fact that the Fourth Circuit would have rejected the reasoning of the panel below and would have reached a different result. In direct conflict with the Ninth Circuit's view that undocumented aliens must be permitted to pursue Title VII claims, the Fourth Circuit held that such a rule would contradict "Congress' unequivocal declaration that it is illegal to hire unauthorized aliens and its mandate that employers immediately discharge unauthorized aliens upon discovering their undocumented status." *Egbuna*, 153 F.3d at 188. In-

stead, the Ninth Circuit's decision echoes the view of the Fourth Circuit *dissenters* that precluding Title VII claims would "defeat[] Congress's desire to eradicate employment discrimination." *Ibid.*

Other decisions squarely conclude that *Hoffman Plastic* extends beyond the NLRA context. For example, in *Escobar* v. *Spartan Security Service*, 281 F. Supp. 2d 895 (S.D. Tex. 2003), a sexual harassment/retaliation case brought by a worker who was undocumented but subsequently obtained authorization to work in the U.S. prior to filing his lawsuit, the court held that *Hoffman Plastic* precludes recovery of backpay in a Title VII case.

In *Veliz* v. *Rental Service Corp.*, 313 F. Supp. 2d 1317 (M.D. Fla. 2003), the Court granted the defendant-manufacturer's motion for summary judgment with regard to a lost wages claim made by the estate of an undocumented alien in a products liability case. "Following *Hoffman*, this Court finds that it cannot condone an award of lost wages here. In addition to trenching upon the immigration policy of the United States and condoning prior violations of immigration laws, awarding lost wages would be tantamount to violating the IRCA."

Similarly, in *Hernandez-Cortez* v. *Hernandez*, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS 19780 (D. Kan. Nov. 4, 2003), the court relied on *Hoffman Plastic* to hold that a plaintiff in a personal injury case cannot recover "lost income based on projected earnings in the United States" because he was an undocumented alien.

And in *Renteria* v. *Italia Foods, Inc.*, No. 02 C 495, 2003 U.S. Dist. LEXIS 14698 (N.D. Ill. Aug. 25, 2003), the Court relied on *Hoffman Plastic* to hold that certain plaintiffs were precluded from recovering back- and frontpay for their FLSA retaliatory discharge claims because they were not legally authorized to work in the United States. The court noted that "[t]he policies that motivated the enactment of the IRCA are certainly subject to debate, but the IRCA is the law of the

land, and the Supreme Court has made it clear [in *Hoffman Plastic*] that awarding back pay to undocumented aliens contravenes the policies embodied in that law."

State courts have come to the same conclusion. Thus, in *Sanchez* v. *Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. App. 2003), appeal granted by 671 N.W.2d 874 (Mich. 2003), and dismissed, 684 N.W.2d 342 (2004), the court held that undocumented workers were ineligible to receive weekly wage-loss benefits under state workers' compensation laws in light of a state law ordering the suspension of benefits for an employee who was unable to perform work because he had committed a crime. Citing *Hoffman Plastic*, the court explained that "the highest court in the land speaks with authority when it comes to determining what is a federal crime and when a violation has occurred." Similarly, in *Crespo* v. *Evergo Corp.*, 841 A.2d 471 (N.J. Super. App. Div. 2004), the court relied on *Hoffman Plastic* and IRCA to dismiss a state-law complaint alleging discriminatory termination, while in *Majlinger* v. *Cassino Contracting Corp.*, 766 N.Y.S.2d 332 (N.Y. Sup. Ct. 2003), the court granted the defendant summary judgment on the ground that an undocumented alien cannot recover lost earnings due to injury. The court explained: "Although New York law has, in the past, permitted the recovery of lost wages for undocumented illegal aliens, the interpretation afforded to the Immigration Reform and Control Act (IRCA) by the United States Supreme Court in *Hoffman* would appear to require this court to conclude that the plaintiff should not be permitted to recover for lost wages given his inability to prove he is legally authorized to work in this country."

Certiorari should accordingly be granted in order to bring uniformity to federal law on this important and recurring question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Howard Sagaser
William Hahesy
Sara Hedgpeth-Harris
SAGASER, FRANSON & JONES
2445 Capitol Street
Second Floor
Fresno, CA 93721

Thomas C. Goldstein
(*Counsel of Record*)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

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